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No. 99-1878

In the
Supreme Court of the United States

OCTOBER TERM, 1999

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, *Petitioners,*

v.

MICHIGAN BELL TELEPHONE CO., UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and CLIMAX TELEPHONE CO., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

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QUESTION PRESENTED

Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in exercising their authority under the federal Telecommunications Act of 1996 to arbitrate and approve interconnection agreements between local telephone exchange carriers can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Michigan Bell Telephone Company d/b/a Ameritech Michigan is a wholly-owned subsidiary of Ameritech Corporation, which is in turn a wholly-owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 202 F.3d 862 (6th Cir. 2000). The order of the court of appeals denying the petition for rehearing with suggestion of rehearing en banc (Pet. App. 39a-40a) is unreported. The order of the district court (Pet. App. 17a) and the transcript in which the district court set forth its reasons for its decision (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. The petition for rehearing with suggestion of rehearing en banc was denied on February 16, 2000. The petition for writ of certiorari was filed on May 15, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court under 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337. Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291 and the collateral order doctrine. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

STATEMENT

A. The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6 (1999). As Justice Scalia's opinion for the Court explained, "the question"

under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 378 n.6 (emphasis added).

The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Sections 251 and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Under the Act, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into these "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Section 252 of the Act prescribes the process through which a competing LEC may arrive at an agreement with an incumbent LEC for the performance of the duties established in section 251. The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the

interconnection agreement. 47 U.S.C. § 252(b)(1).[1/] In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C), and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2).

As the foregoing demonstrates, state regulators who participate in the federal scheme are not simply "allowed to do their own thing"; rather, they "must hew" to the lines drawn by the federal courts and the FCC. *AT&T Corp.*, 525 U.S. at 378 n.6. The mechanism for ensuring that state regulators comply with the Act is 47 U.S.C. § 252(e)(6). After the state regulators approve or reject an interconnection agreement, section 252(e)(6) authorizes "any party aggrieved" by a "determination" under section 252 to bring an action in "Federal district court"

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[1] The state commission need not participate in this process. If it does not, the Act provides that the Federal Communications Commission ("FCC") "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5).

to determine whether the final agreement "meets the requirements of" sections 251 and 252.[2/] And this is the sole mechanism for ensuring the primacy of federal law, because Congress expressly foreclosed state court review of such determinations. 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section").

Federal judicial review of state commission determinations relating to section 252 agreements is obviously a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the application of federal telecommunications law, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

B. The Agreement and the Challenged Order. In 1996, Climax Telephone Company ("Climax") sought to expand its local exchange service into calling areas in which Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech") was the incumbent LEC. Pet. App. 2a-3a. Climax and Ameritech began negotiating an interconnection agreement under the Act, but were unable to conclude a completed agreement through negotiation alone. *Id.* at 3a. On March 10,

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[2] Section 252(e)(6) also contemplates "judicial review of the [FCC's] actions" if the state commission fails to carry out its responsibilities under the Act.

1997, Climax filed a petition for arbitration pursuant to 47 U.S.C. § 252(b)(1) with the Michigan Public Service Commission ("MPSC"). *Id.* The MPSC chose to arbitrate the remaining open issues and assigned the matter to an Arbitration Panel. *Id.* On May 21, 1997, the Panel issued its decision. *Id.* On June 25, 1997, the Commissioners issued their "Order Adopting Arbitration Agreement," which adopted the recommendations of the Panel, and ordered the parties to submit a signed interconnection agreement. Pet. App. 18a-33a. On August 13, 1997, the Commissioners issued their final "Opinion and Order" approving the Agreement. Pet. App. 34a-37a.

C. The Proceedings Below. Pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337, Ameritech filed suit in federal district court against Climax and the individual Commissioners in their official capacities. Pet. App. 4a. In its complaint, Ameritech alleged that various obligations imposed on Ameritech are contrary to federal law. *Id.* Ameritech sought declaratory, injunctive, and other equitable relief from those obligations. *Id.*

Despite having participated in the arbitration and approval process under the Act, the Commissioners moved to dismiss Ameritech's complaint, asserting immunity from suit in federal court under the Eleventh Amendment to the United States Constitution.[3] Pet. App. 4a. The district court denied the

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[3] The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State,

(continued...)

Commissioners' motion. Pet. App. 12a-17a. The Sixth Circuit affirmed, holding that "the case before this court is a straightforward *Ex parte Young* case." Pet. App. 8a.[4] As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* at 8a-9a. On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * * for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* at 9a.

REASONS FOR DENYING THE PETITION

The question presented in the petition clearly does not warrant this Court's review. To begin with, there is no circuit conflict on the availability of an *Ex parte Young* remedy to "bring * * * to heel" state public utility commissioners who are

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[3](...continued)
or by Citizens or Subjects of any Foreign State."

U.S. Const. amend. XI.

[4] Circuit Judge Cole dissented in part on grounds unrelated to the Commissioners petition. In regard to the issue on which the Commissioners seek certiorari, Judge Cole wrote that he is "in complete agreement with the majority's disposition of the Commissioners' Eleventh Amendment claim." Pet. App. 10a.

"not regulating in accordance with federal policy" (*AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)) under the federal Telecommunications Act of 1996. Only one other court of appeals has addressed the question whether a party to an interconnection agreement that had been approved by a state commission could maintain a suit under section 252(e)(6) of the Act against the state commissioners in their official capacities. That court expressly "adopt[ed] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecomms. Corp.* v. *Public Serv. Comm'n of Utah*, 2000 WL 783382, at *9 (10th Cir. June 20, 2000) (quoting *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000)).

In addition, notwithstanding petitioners' efforts to manufacture tension between the Sixth Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the two are entirely consistent. In *Seminole Tribe*, this Court concluded that an *Ex parte Young* remedy was unavailable to enforce compliance with the Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. § 2701 *et seq.*) ("IGRA"), because Congress had clearly limited the methods of judicial redress under the IGRA and those limitations were inconsistent with the judicial remedies available in an *Ex parte Young* action. There are no such limitations on the methods of judicial redress under section 252(e)(6) of the Act. Indeed, *Ex parte Young* provides a federal court with the precise tool that it needs to accomplish Congress' goal in section 252(e)(6) of ensuring that state officials adhere to federal law in discharging the federal regulatory functions they undertake to perform under the 1996 Act.

Finally, petitioners' attempts to suggest that the Sixth Circuit's decision is contrary to *Ex parte Young* itself are wholly unavailing. For example, petitioners' contention that their

actions are discretionary, and thus outside the scope of *Ex parte Young* (Pet. 12-13), ignores the principle articulated in *Ex parte Young* itself that a state official lacks discretion to violate federal law. Likewise, petitioners' argument that *Ex parte Young* does not apply because their approval of the interconnection agreement that imposed the challenged obligations on Ameritech took place in the "past" (Pet. 14-16) is simply wrong. Regardless of whether the state regulatory proceedings themselves are ongoing — and they are, for the petitioners expressly reserved jurisdiction to issue further orders as necessary — there can be no question that the *effects* of the obligations imposed on Ameritech in petitioners' orders are ongoing. Ameritech remains bound by those orders, until set aside by a federal court under section 252(e)(6), and thus is entitled to seek a declaration that those orders should not be enforced because they violate federal law.

In short, petitioners have neither demonstrated the existence of a circuit conflict nor shown a conflict between the court of appeals' decision and "relevant decisions of this Court." Sup. Ct. R. 10(a) & (c). Accordingly, there are no "compelling reasons," Sup. Ct. R. 10, for granting review in this case.

I. THERE IS NO CONFLICT IN THE CIRCUITS ON THE QUESTION PRESENTED.

Prior to the Sixth Circuit's decision in this case, no federal court of appeals had addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 could be maintained under the *Ex parte Young* doctrine. The Sixth Circuit's affirmative answer to that question thus was a ruling of first impression in the circuits. Since the Sixth Circuit's ruling, however, the Tenth Circuit has reached precisely the same conclusion as did the

Sixth Circuit. *MCI Telecomms. Corp.* v. *Public Serv. Comm'n of Utah*, 2000 WL 783382, at *9 (10th Cir. June 20, 2000).

The procedural history of *MCI Telecomms.* parallels this case in every pertinent respect. Competing LECs filed petitions with the Utah Public Service Commission requesting arbitration of certain open issues relating to section 252 interconnection agreements with the incumbent LEC. *MCI Telecomms. Corp.*, 2000 WL 783382, at *4. The Utah state regulators conducted the requested arbitration, "issued an arbitration order resolving a number of open issues," and "directed the parties to file fully executed interconnection agreements * * * that were consistent with the UPSC's resolution of the parties' disputes." *Id.* The Utah commissioners then "reviewed and approved the submitted interconnection agreements pursuant to 47 U.S.C.A. § 252(e)." *Id.* The incumbent LEC subsequently brought suit under section 252(e)(6), alleging that certain determinations by the state commissioners violated federal law. See *id.*; see also *id.*, at *10 (discussing but not resolving the incumbent LECs claim on the merits).

The state commissioners moved to dismiss, asserting, *inter alia*, that they are immune from suit on Eleventh Amendment grounds. *MCI Telecomms. Corp.*, 2000 WL 783382, at *4. The district court denied the motion to dismiss. *Id.* at *5.[5] The Tenth Circuit affirmed on alternative grounds. First, the court held that "Utah voluntarily waived its sovereign immunity when the UPSC, through its commissioners, arbitrated the

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[5] In this case, Ameritech sued only the Commissioners in their official capacities; Ameritech did not sue the MPSC itself. Accordingly, the Sixth Circuit did not need to address whether the MPSC consented to suit in federal court through its voluntary participation in the federal regulatory scheme.

interconnection dispute in this case." *Id.* at *8. Second, the court held that "[e]ven if the Eleventh Amendment barred U. S. West's suit against the UPSC, U. S. West still could proceed with its suit" against the commissioners in their official capacities under *Ex parte Young*. *Id.* at *9. In so doing, the Tenth Circuit expressly "adopt[ed] the Sixth Circuit's rationale and holding" that an action under section 252(e)(6) against state commissioners, in their official capacities, seeking equitable relief for ongoing violations of federal law is "'a straightforward *Ex parte Young* case.'" *Id.* (quoting *Michigan Bell Tel. Co.* v.. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000)). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

II. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *SEMINOLE TRIBE*.

The principal basis on which petitioners seek this Court's review is a purported conflict between the Sixth Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As demonstrated below, the detailed remedial scheme that strictly limits the methods of judicial redress under the Indian Gaming Regulatory Act ("IGRA") in ways that are inconsistent with the judicial remedies available under *Ex parte Young* simply has no analog under the Telecommunications Act of 1996. The 1996 Act places no limitations at all on the remedies that a federal court may use in a section 252(e)(6) suit to ensure that the obligations imposed on incumbent LECs through interconnection agreements comport with the 1996 Act. *Ex parte Young* and the Act's judicial review provisions work together to effectuate Congress' manifest intent in the 1996 Act that state officials exercising federal regulatory

power under the Act adhere to federal law. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

1. As this Court observed in *Seminole Tribe*, the IGRA imposes a duty on states to negotiate in good faith with Indian tribes concerning gaming on reservations, 25 U.S.C. § 2710(d)(3)(A), "in conjunction with" a very "carefully crafted and intricate remedial scheme" for limited enforcement of that duty, *id.* § 2710(d)(7). *Seminole Tribe*, 517 U.S. at 73-74. For example, although IGRA authorizes a federal court to order a state to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(iii), the IGRA does not permit the court to enforce its own order with contempt sanctions, as it may do in normal circumstances. Instead, if a state flouts the court's order to negotiate, the court may only refer the matter to a mediator, who will consider proposed compacts submitted by the parties and choose the one that "best embodies the terms of the Act." *Id.* § 2710(d)(7)(B)(iv); see *Seminole Tribe*, 517 U.S. at 74. And, perhaps most important, under the IGRA a state will not be subject to judicial sanctions, such as contempt, even if it refuses to honor the compact selected by the mediator. In that event, "the only sanction * * * is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations" governing gaming on the tribal lands at issue. *Seminole Tribe*, 517 U.S. at 74-75.

After holding that Congress lacks authority under the Indian commerce clause to abrogate the states' Eleventh Amendment immunity, this Court turned to the Tribe's contention that jurisdiction over its suit was proper under the *Ex parte Young* doctrine. In addressing that question, the Court first expressly reaffirmed the vitality and importance of the *Ex parte Young* doctrine in "ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. As the Court explained, "an individual can bring suit against a state officer in

order to ensure that the officer's conduct is in compliance with federal law." *Id.* And the Court stressed that *Ex parte Young* may be used to enforce state compliance with federal law *except* in the rare case in which (i) Congress has *specifically limited* the judicial remedies available against a state or its officials *and* (ii) those statutory limitations are *inconsistent* with the judicial remedies available against state officials under *Ex parte Young*. *Id.* at 71-72 & nn.14, 16. Applying this standard to the IGRA, the Court concluded that by confining the available remedies to a "quite modest set of sanctions," Congress had "strongly indicate[d] that [it] had no wish to" permit the judicial remedies against state officials that would be available under *Ex parte Young*. *Id.* at 75-76.

Central to the *Ex parte Young* holding in *Seminole Tribe* was the recognition that Congress placed express limits on the methods of judicial redress available to courts presented with a claim that a state had failed to comply with the IGRA. For that reason, allowing a party to use the federal courts to coerce a state into compliance with the IGRA through an injunction under *Ex parte Young*, backed by the threat of contempt in the event of disobedience, would have been inconsistent with the essentially non-coercive remedial scheme in the IGRA. But where Congress has not limited the available avenues of judicial redress, the post-*Seminole Tribe* decisions in the courts of appeals consistently have recognized the continuing applicability of the *Ex parte Young* doctrine. *E.g.*, *Ellis* v. *University of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1999) (allowing suit under *Ex parte Young* to proceed because 42 U.S.C. § 1981 contains "nothing that indicates a 'detailed remedial scheme' designed to limit or prevent potential remedies within the *Seminole Tribe* meaning"); *Marie O.* v. *Edgar*, 131 F.3d 610, 616 (7th Cir. 1997) (allowing suit under *Ex parte Young* to proceed because "[i]n contrast with *Seminole*

Tribe * * * there is no explicit remedial scheme that provides only limited redress in federal court" for violation of Part H of the Individuals with Disabilities Education Act).

There is absolutely no tension, let alone inconsistency, between an *Ex parte Young* remedy and the Congressionally-prescribed remedy under the judicial review provisions in the 1996 Act. Unlike the situation in *Seminole Tribe*, permitting section 252(e)(6) suits to proceed under *Ex parte Young* would not "cast[] aside * * * limitations" that Congress intentionally created through "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. There simply are *no* limitations in section 252(e)(6) on the remedies that a federal court may use to ensure that state officials performing federal regulatory functions under the Act comply with federal law. Section 252(e) simply instructs the federal court to review the state regulators' actions for compliance with the 1996 Act and, if those actions deviate from the Act, the court may fashion any appropriate relief needed to ensure that the officials "hew" to "the lines" drawn by the Act. *Cf. AT&T Corp.*, 525 U.S. at 378 n.6.

An *Ex parte Young* suit to ensure compliance with the 1996 Act is therefore fully consistent with the remedy that Congress prescribed. Indeed, it would be difficult to fashion a tighter fit between the remedy contemplated in the Act (a federal court order requiring that the agreement be modified to meet the requirements of the federal Act) and *Ex parte Young*'s core function of permitting "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *Ex parte*

Young, 209 U.S. 123 (1908)).[6] In short, as one district court recently noted, "the remedy provided for by statute [under the Act] and the remedy under *Young* are one and the same." *Bell Atlantic-Delaware, Inc.* v. *Global Naps South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999).

2. Having failed to come to grips with the fundamental distinction between this case and *Seminole Tribe* — that Congress placed no limits whatsoever on the methods of judicial redress in an action under section 252(e)(6) of the 1996 Act — petitioners troll at the margins of that decision, straining for a way to shoehorn this case into the *Seminole Tribe* paradigm. But petitioners' efforts are deeply flawed.

a. Petitioners first suggest that the availability of *Ex parte Young* will encourage parties to rush to federal court before the preconditions of a section 252(e)(6) action — negotiation, arbitration, and approval of a final interconnection agreement — have been completed. Pet. 9-11. This suggestion is baffling. Nothing in the Sixth Circuit's decision even remotely suggests that a party need not comply with all procedural requirements under the Act before seeking judicial review. All that the Sixth Circuit held is that *Ex parte Young* is an appropriate means of securing review of final action by state regulators approving or

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[6] The Commissioners' statement that Congress "limited review in federal court to whether the interconnection agreements comply with the requirements of the [1996 Act]" (Pet. 9) confuses the scope of federal court review with the scope of available remedies. If anything, Congress' intimation in section 252(e)(6) that federal court review is limited to issues of federal law suggests that an *Ex parte Young* remedy is precisely what Congress had in mind when it authorized federal judicial review of state commission action.

rejecting an interconnection agreement under section 252(e)(2) of the Act to ensure that those officials operate within the confines of the Act. Pet. App. 8a-9a.

The decisions that petitioners cite — "reject[ing] attempts by parties to obtain judicial review of State commission rulings during the arbitration process that did not involve or follow the approval of final agreements," Pet. 9 — are both unobjectionable and irrelevant to the *Ex parte Young* analysis. Those cases quite properly limit the timing of an action for review of state regulator determinations under section 252(e)(6); in no way do they limit the scope of available judicial remedies for final state commission determinations that do not meet the requirements of federal law. As those decisions recognize, Congress has set forth a step-by-step administrative procedure that ends with review in federal court under section 252(e)(6). No action challenging state commission determinations arbitrating, approving or rejecting an interconnection agreement can be maintained until the commission's determinations are final. And nothing in the Sixth Circuit's opinion suggests otherwise. In short, the Sixth Circuit's *Ex parte Young* ruling does not create substantive rights, expand in any way the scope of judicial review, or add to or subtract from the range of remedies available under the Act.

b. Petitioners also contend that an *Ex parte Young* action should be unavailable here because the Act only "authorizes the review of interconnection agreements," not review of the determinations that form the basis for obligations that state regulators order to be included in the agreements. Pet. 8-9. As both the Sixth and Seventh Circuits have concluded, this argument has no basis in the 1996 Act. Pet. App. 9a-10a; *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999).

The text and structure of section 252 strongly support the courts of appeals' rejection of petitioners' misguided theory that Congress intended federal courts only to review disembodied "agreements." Section 252(e)(6) is entitled "Review of *State Commission Actions*," and explicitly provides that the federal courthouse door swings open only for those "aggrieved" by a state commission "determination" under section 252. In addition, section 252(e)(4) of the Act — which, as the Seventh Circuit held, must be "read in conjunction with subsection 252(e)(6)," *Illinois Bell*, 179 F.3d at 571 — provides that "[n]o State court shall have jurisdiction to review *the action of a State commission* in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). Section 252(e)(4) thus takes away from state courts what 252(e)(6) confers on federal courts — namely, the power "to review the *Action of a State commission*." And section 252(e)(1) of the Act requires "written findings," a requirement that makes sense only if the state regulators' actions will later be subject to judicial review using the agency record.

Moreover, in actions for judicial review of an agency determination, it is standard procedure for the agency or its officials to appear in federal court to defend its decision. See, *e.g.*, 5 U.S.C. § 702; Fed. R. App. P. 15. And such suits are so frequent, that Fed. R. App. P. 43 provides for automatic substitution of successor officers when officials who are parties to lawsuits leave office. When Congress provided for "[r]eview of state commission actions" in section 252(e)(6), it was legislating against the background rule that agencies or agency officials are usually parties to the judicial review of their orders. In short, Congress must be presumed to have known that the *Ex parte Young* doctrine enables the federal courts to "bring * * * to heel" recalcitrant state officials who refuse to "hew" to "the

lines" drawn by the Act and its implementing regulations. *AT&T Corp.*, 525 U.S. at 378 n.6.[7]

III. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THE *EX PARTE YOUNG* DOCTRINE.

In their final section, petitioners claim that the Sixth Circuit misapplied *Ex parte Young* in two respects. First, petitioners assert that an *Ex parte Young* action would improperly interfere

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[7] It bears mentioning that the 1996 Act also differs from the IGRA with respect to who may be sued. In *Seminole Tribe*, this Court looked to the statutory language and the duty that it imposed in concluding that the IGRA did not contemplate "both a suit against a State * * * and a suit against a state official." 517 U.S. at 75 n.17. As the Court noted, the IGRA refers repeatedly to "the State." *Id.* And "the duty imposed by the Act — to 'negotiate * * * in good faith to enter into' a compact with another sovereign — stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers." *Id.* Neither circumstance is present here. First, the definition of "State commission" in the Act reveals that Congress did not intend to refer to the sovereign, but instead to a group of officials exercising delegated power within the state government: "The term 'State commission' means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41). Second, the state commission determinations that are reviewable under section 252(e)(6) are always performed by "an individual state executive officer or * * * a group of officers." *Seminole Tribe*, 517 U.S. at 75 n.17.

with the exercise of state agency discretion relating to the arbitration and approval or rejection of interconnection agreements. Pet. 12-13. Second, they suggest that this is not a proper *Ex parte Young* action because their orders have no "ongoing" effects and, at most, constitute "past violations" of federal law. Pet. 14-16. Petitioners' contentions are way off the mark. Petitioners have no discretion to violate federal law, and their orders impose forward-looking — and thus ongoing — obligations on Ameritech. The Sixth Circuit correctly held that this "is a straightforward *Ex parte Young* case." Pet. App. 8a; see also *MCI Telecomms. Corp.* v. *Public Serv. Comm'n of Utah*, 2000 WL 783382, at *9 (10th Cir. June 20, 2000) (agreeing that *Ex parte Young* applies in this scenario). It is petitioners, not the courts of appeals, that misapprehend the *Ex parte Young* doctrine.

1. Under *Ex parte Young* and its progeny, even where the state itself is immune from suit in federal court, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). As many courts have observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of his or her immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. 123, 159-60 (1908). The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and

"to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

This Court permitted actions to enjoin state officials acting in violation of federal law — which today might be called "*Ex parte Young* actions" in shorthand — long before *Ex parte Young* itself was decided. See *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-05 & n.14 (1952) (noting that the Court had "long held," prior to 1908, that injunctive actions against state officers could proceed consistent with the Eleventh Amendment and that *Ex parte Young*, merely "reexamined and reaffirmed" that principle); *Ex parte Young*, 209 U.S. at 167 (noting that "jurisdiction of this general character has * * * been exercised by Federal courts from the time of *Osborn* v. *Bank of United States*," a case decided in 1824). Indeed, federal courts have followed a longstanding practice of reviewing the actions of state public utility commissions pursuant to the rule of *Ex parte Young*. See, *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951). And this Court's recent decisions have reaffirmed the vitality of the *Young* doctrine.

Just last Term in *Alden* v. *Maine* the Court stated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-48 (1999); see also *id.* at 757.[8] Under this

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[8] And two Terms earlier, all nine Justices reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997); see also *id.* at 281 ("[a]n allegation of an on-going violation of federal law

(continued...)

Court's decisions, to determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Ameritech's complaint easily meets this test, because it (i) alleges that the commissioners approved an interconnection agreement that imposes prospective, binding obligations on Ameritech and that those obligations are inconsistent with federal law and (ii) seeks equitable relief from those allegedly unlawful obligations. Pet. App. 8a-9a.

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[8](...continued)
where the requested relief is prospective is ordinarily sufficient to invoke [*Ex parte Young*]"); *id.* at 293 (O'Connor, J., concurring in part and concurring in the judgment) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law"). As Justice O'Connor stated, the *Ex parte Young* doctrine remains a "basic principle of federal law" that reflects "the importance of having federal courts open to enforce and interpret federal rights." *Id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

2. Contrary to petitioners' suggestion (Pet. 12-13), they have a duty to comply with the numerous substantive and procedural requirements imposed by federal law. Once petitioners opted to participate in the arbitration and approval process under the Act, they were duty bound to ensure that the interconnection agreement they imposed on Ameritech comported with federal law. Simply put, under the Supremacy Clause, petitioners have no discretion to violate federal law when discharging their duties under the Act.

The Commissioners rely on this Court's statement in *Ex parte Young* that the courts "cannot control the exercise of the discretion" of a state officer. Pet. at 12-13 (quoting *Ex parte Young*, 209 U.S. at 158). Later in the same decision, however, the Court expressly held that state officials' "general discretion regarding the enforcement of the laws * * * is not interfered with by an injunction which restrains the state officer from taking any steps toward the enforcement of an unconstitutional enactment, to the injury of the complainant." *Ex parte Young*, 209 U.S. at 159. As the Court explained, "[a]n injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.*; see also *Poindexter* v. *Greenhow*, 114 U.S. 270, 290 (1885) ("the distinction between the government of a state and the state itself is important, and should be observed"); *id.* ("whatever wrong is attempted in [the] name [of the state] is imputable to its government, and not to the state, for, as [the state] can speak and act only by law, whatever it does say and do must be lawful"). Where, as here, a complaint properly alleges that state officials have committed ongoing violations of federal law, petitioners' reliance on the concept of discretion is misplaced.

3. Petitioners' suggestion that this is not a proper *Ex parte Young* action because their orders have no "ongoing"

effects and, at most, constitute "past violations" of federal law is simply wrong. Under section 252, if the parties cannot agree on what terms and conditions are required by the Act, state public utility commissioners step in as *regulators* and "impos[e] appropriate conditions as required to implement" the federal Act. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1). The state officials then require the parties to put those obligations into an interconnection agreement prior to seeking final approval. 47 U.S.C. § 252(e)(1). In performing these functions, petitioners exercised *coercive regulatory power*, and what resulted from their exercise of that power was a carrier-specific government regulation that is legally binding on the parties unless and until it is set aside by a federal court pursuant to section 252(e)(6).

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in the Climax agreement are available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection orders that Ameritech is challenging here have "ongoing" legal consequences.

Because petitioners' orders have ongoing legal effects, petitioners' contention that "there is no ongoing case" (Pet. 14) is beside the point.[9/] It is well established that an official

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[9] In any event, petitioners' suggestion that their involvement in the interconnection process ends with their approval of an interconnection agreement (Pet. 14-15) is refuted by their own actions. For example, in a January 28, 1998 decision arising out of an interconnection agreement dispute between Ameritech and several other carriers, petitioners held that (continued...)

capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought acts prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*). In any event, petitioners' claim that "there is no ongoing case" is suspect as a factual matter, for petitioners expressly "reserve[d] jurisdiction" to "issue further orders as necessary" in this case. Pet. App. 37a.

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[9](...continued)
Ameritech's actions violated "*the Commission's orders approving the interconnection agreements.*" *In re Brooks Fiber Communications, Inc.*, 1998 Mich. PSC LEXIS 47, at *25 (Mich. Pub. Serv. Comm'n Jan. 28, 1998) (emphasis added). Obviously Ameritech could not "violate" an order that imposes no "ongoing" obligation on it.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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